graphs (h) to (l) provide for all subsequent proceedings until the verdict is given.

Thus, when the whole of section 173 is viewed in logical order, it will be seen that paragraph (g) has a good *raison d'être* for its interposition between paragraph (f) and (h) *et seq.* It is to be remembered that the procedure in section 173 is for *summary* trials. There are constantly cases coming up in subordinate courts where the very corner-stone in the prosecution case collapses at an early stage for a variety of reasons. In that event, should the Magistrate continue in the profitless labour of hearing the rest of the prosecution to the bitter end, whilst realising that at the close of the prosecution he would surely have to pronounce a verdict of acquittal? Without the express powers given him by paragraph (g) the futile exercise is inevitable. Therefore the paragraph provides that: —

"(g) Nothing in paragraph (f) shall be deemed to prevent the court from discharging the accused at *any* previous stage of the case if for reasons to be recorded by the court it considers the charge to be groundless."

But Magistrates may occasionally be over-hasty; they may have misdirected themselves or fallen into error in other ways, when deciding to dismiss a case without wasting any more time on the prosecution. Accordingly they are required to state their reasons for so doing and, lest their error lead to irremediable consequences, they are authorised only to "discharge" the accused; not, be it noted, to "acquit" him. Thus the plea of *autrefois acquit* under section 302(i) would not be available to a person discharged who is *not at the same time acquitted* at the previous trial for the same offence. Sub-section (v) of section 302 goes on to state expressly that "the dismissal of a complaint, or the *discharge* of the accused, is not an acquittal for the purposes of this section". Hence the discharge of the applicant in the instant case by the first President cannot, in our opinion, be pleaded as a bar to the second prosecution.

It is true that under section 306 of the Criminal Procedure Code the Public Prosecutor may appeal against an order of acquittal made by any Magistrate. That provision, however, is one of general application, in no way derogating from the provisions of paragraph (g) in section 173. It is only an acquittal which requires to be set aside by the High Court before any retrial on the same charge can proceed. Hence, in paragraphs (f) and (g), the distinction between acquittal and discharge is carefully drawn by reason of the different consequences which follow a discharge not amounting to acquittal. When an order is made under paragraph (g) no appeal is necessary to have the order set aside since it is not an acquittal. It may be added that paragraph (g) by implication does not, in our opinion, authorise a Magistrate to make an order of *discharge amounting to acquittal* in any case *before the close of the prosecution.* Where the sole or main prop in the prosecution case prematurely collapses, the prosecuting officer may in his discretion offer no further evidence. In that event, if it is clearly foreseeable that the witnesses remaining to be called would be unable to establish a *prima facie* case in the teeth of evidence previously recorded, the accused may, of course, be acquitted, but such an order would in effect fall to be made equally well under paragraph (f) of section 173, or sub-sections (ii) and (iii) of section 254 of the Criminal Procedure Code.

Accordingly, the answer to question (a) is "yes"; to question (b) is again "yes"; to question (c) is "no" which necessarily makes question (d) otiose.

Questions answered.

Solicitors: *Yeow & Chin.*

LAI SENG & CO. v. GOVERNMENT OF MALAYSIA & ORS.

[O.C.J. (Chang Min Tat J.) April 20, 1973]

[Penang — Civil Suit No. 241 of 1971]

Government Proceedings — Action against Government — Whether public officer involved must be sufficiently identified — Whether non-joinder fatal — R.S.C. 1957, O. 16, r. 11 — Government Proceedings Ordinance, 1956, ss. 5, 6 & 18.

The plaintiff brought an action, *inter alia,* for a declaration that the defendants were not entitled to claim excess duty and for the release of detained goods. The defendants applied to set aside the proceedings for non-compliance with the provisions of the Government Proceedings Ordinance, 1956, in that the servants of the first defendant had not been sufficiently identified. In support of the application it was contended that the identity of the officer who applied or decided to apply the taxing code must be ascertained.

Held: on a proper reading of the relevant provisions of the Government Proceedings Ordinance and O.16 r.11 of the R.S.C., failure to identify the officer concerned would not incapacitate the action in this case. The application should therefore be dismissed with costs.

Cases referred to:-

(1) *Ponnusami* v. *Ratnam and the Government of Malaysia* [1965] 2 M.L.J. 268.

(2) *Haji Abdul Rahman* v. *Government of Malaysia & Anor.* [1966] 2 M.L.J. 174.

(3) *Adams* v. *Naylor* [1946] A.C. 543, 550.

APPLICATION.

Abdul Razak bin Datuk Abu Samah (Sr. Federal Counsel) for the applicant.

P. R. Manecksha for the respondent.

Chang Min Tat J.: This was an application by the defendants to set aside the proceedings in this action with costs for non-compliance with the provision of the Government Proceedings Ordinance 1956, viz. in that the servants of the first defendant have not been sufficiently identified.

The action arose out of the difficulties encountered by the plaintiff, a firm of exporters and importers, in re-exporting goods to the principal customs area on the mainland. The difficulties concerned rather divergent views on the duties that could be imposed on the exports. In respect of the shipments of one particular item, alleged to be cotton table napkins, the plaintiff paid duty in the sum of $1,263.50 at the rate of 25% on the value thereof, as declared. The customs applied another taxing code and demanded further duties amounting to $11,247.35¢. The plaintiff had at all

times refused to meet this demand and was then told that the customs would act under section 17 of the Customs Act 1967 to detain any goods belonging to the plaintiff in their custody for the recovery of this sum. The customs carried out their threat in respect of one subsequent shipment, and rejected the plaintiff's customs' declaration in respect of another.

On this the plaintiff brought this action for

(a) a declaration that the defendants are not entitled to claim the excess duty of $11,247.35¢

(b) release of its goods detained at the customs warehouse at Butterworth

(c) an injunction to prevent the defendants or their servants or agents from refusing to accept the plaintiff's import and export declarations or detain the plaintiff's goods for recovery of the sum and

(d) costs.

The parties sued were 1. The Government of Malaysia, 2. The Comptroller-General of Customs and Excise and 3. The Assistant-Comptroller of Customs and Excise, Penang and Butterworth.

The writ that was issued on 4 September 1971 contained the additional endorsement that the 1st defendant was sued as the authority in charge of the Department of Customs and Excise and the 2nd defendant was sued as the Comptroller-General of Customs and Excise having over-all control under section 3(2) of the Customs Act 1952 and the 3rd defendant under section 3(4) of the Customs Act and other servants and agents of the defendants whose names are to the plaintiff unknown.

This additional endorsement was made in compliance with the requirements of Order 3 Rule 3A of the Rules of the Supreme Court. The rule is stated in these terms:

r.3A: Notwithstanding anything in Rule 2 or Rule 3 of this Order the indorsement of claim in proceedings against a Government shall contain information as to the circumstances in which it is alleged that the liability of the Government has arisen and as to the Government Departments and officers concerned. In such proceedings if the defendant considers that the indorsement of claim does not contain sufficient information as aforesaid, the defendant may, at any time before the time limited by the writ of summons for appearance has expired, by notice in writing to the plaintiff request further information as specified in the notice. Where such a notice has been given the time for appearance shall expire four days after the defendant has notified the plaintiff in writing that the defendant is satisfied or four days after the Court or a Judge has, on the application of the plaintiff by summons served on the defendant not less than seven days before the return day, decided that no further information as to the matters aforesaid is reasonably required.

The defendants were duly given notice in lieu of service, at least the 1st defendant was and well within time they entered unconditional appearances.

In the meantime, the plaintiff applied by notice of motion and obtained from me an injunction in terms of the third relief it sought in the writ. It disclosed in an affidavit affirmed by a director of the company that the customs were prepared to release the goods detained upon payment of the additional sum demanded. The plaintiff paid 25% of this sum under protest. The application for the injunction was made *ex parte* and granted on the condition that the plaintiff deposited in court the balance of the further duty, which came to $8,435.51. Leave was also given to the defendants to apply to set aside the injunction but probably for the same reasoning which moved me that there should be no undue hindrance on trade, no move was made to set it aside. Or it might be that with the order for the deposit in court, the customs had effectively secured payment.

The defence which was a joint one was delivered on 31 October 1971 and a reply to the defence was filed on 1 December 1971. On 30 December 1971, the defendants applied to amend the defence and on the order being obtained on 21 January 1972 delivered an amended defence four days later. The amended reply was filed on 14 February 1972.

Then there followed a gap of almost 6 months during which no further step was taken. The parties did not proceed to disclosure of documents. But on 2 August 1972 the defendants made the present application to set aside the entire proceedings.

Learned Senior Federal Counsel in support of the defendants' application contended that the identity of the officer who, in this particular case, applied or decided to apply another taxing code in place of the one chosen by the plaintiff must be ascertained. He relied on two cases: *Ponnusami* v. *Ratnam & the Government of Malaysia*[1] and *Haji Abdul Rahman* v. *Government of Malaysia and Anor.*[2] Both cases dealt with the question of limitation which under the provisions of the Public Authorities Protection Ordinance No. 19 of 1948 was one year from the accrual of the cause of action. In the first case, Ponnusami sued the defendant driver well within time. When the idea came to him that execution of any judgment he might get might become difficult unless the employer was also made a defendant, he applied to join the Government of Malaysia in the action. Though his application was made after the expiry of the limitation period, it was allowed, Ong Hock Sim J. (as he then was) holding that in the circumstances the plaintiff was not barred by time. There was nothing, with respect, in the judgment which stated, either expressly or by implication that the identity of the particular wrongdoer must be stated. Nothing turned on this point.

In the second case, Haji Abdul Rahman's solicitors had deliberately delayed the issue of the writ in a running down case till after the time had run out against him. And when it was issued, it was issued against the Government of Malaysia, as the first defendant and the Public Works Department as the second. By way of demurrer, the Legal Adviser raised two preliminary objections. Plaintiff's counsel conceded that the Public Works Department was not a legal entity who could be sued and promptly applied to strike out the department as a defendant. The other objection was limitation, but it would appear from the judgment that this objection was thought to have two limbs, one whether the action was in the circumstances statute-barred and two, whether an action would lie against the government as principal when the servant of the government was not made a defendant.

As to the first, the learned judge held that since the writ was issued out of the court more than twelve

months after the accident in which the action arose, the claim was time-barred, since on a proper construction, time only stopped running on the issue and not on the presentation of the writ. With respect, I entirely agree.

On this the action stood to be dismissed *in limine* and with every respect, it seems to me therefore that any consideration of the so-called second limb must be extraneous and any decision thereon *obiter*.

The decision on this point was that section 5 and section 6(1) and 6(4) of the Government Proceedings Ordinance contemplate that

"the identity of the officer must be ascertained and the liability of the officer must be established before the Government can be made liable."

Section 5 renders the government liable for tort by any public officer. Section 6(1) limits the action to those torts which "would have lain against such officer personally," while section 6(4) defines such public officer as someone employed at the material time by the government and paid out of government revenues or appropriate funds. With every respect, it does not seem that on a proper reading, these sections can be construed as laying down any strict rule of practice in proceedings against the government, failure to observe which would incapacitate the action. It is correct, I concede, that in an action for tort, the proper defendant is the wrong-doer but the person who is liable for the acts of the wrong-doer or to whom the liability for the injury has passed is also a proper defendant, and for myself, I would adopt the attitude of Viscount Simon,

"the courts before whom such a case as this comes have to decide it as between the parties before them."

in *Adams* v. *Naylor*[3] which is a case for damages for negligence but which must now be read subject to the qualification that since then the Crown Proceedings Act 1947 has come into force.

Section 18 of our Government Proceedings Ordinance 1956 provides

"Subject to the provisions of this Ordinance the provisions of the written law relating to procedure shall apply to civil proceedings by and against the Government in the same way as to suits between subject and subject."

and must by itself and apart from other provisions, introduce the Rules of the Supreme Court. Of these rules, rule 11 of Order 16 provides that

"no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the party actually before it...."

For these reasons, I do not, with respect, agree with the objection.

From a pragmatic point of view, it does not appear to matter at all, either at law or as a matter of evidence who was the particular officer in the Department of Customs and Excise who applied the taxing code now objected to by the plaintiff. There can be no doubt, I suppose, that if required to, government will sunnly the name of the officer concerned but the point is whether government is embarrassed or prejudiced. Clearly it was not. It delivered a defence without difficulty and before making the present application. If the action against government is maintainable in the form in which it is framed, clearly the only issue is the taxing code applicable to the particular goods in question, whether it was the code opted by the plaintiff or the code applied by government. On this issue, the identity of the particular public officer can have very little significance.

The application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *Lim Keun Siew & Co.*

FOH HUP OMNIBUS CO. BERHAD v. MINISTER OF LABOUR AND MANPOWER & ANOR.

[F.C. (Azmi L.P., Gill and Ali F.JJ.) May 4, 1973]

[Alor Star — Federal Court Civil Appeal No. 125 of 1972]

Administrative Law — Certiorari — Application for, to quash decision of Minister — Order for recognition of union — Decision of Minister final — Decision not a nullity — No breach of natural justice.

Industrial Law — Trade union — Recognition — Order — Decision of Minister final — Industrial Relations Act, 1967, s. 8.

This was an appeal against the dismissal of the appellant's motion for an order of *certiorari* to quash the decision of the Minister of Labour and Manpower. A trade union had claimed recognition and when the appellant company refused to accord recognition, the Minister directed the Registrar of Trade Unions to carry out a membership check and as a result thereof, he decided that the trade union be accorded recognition. The appellant company applied for an order of *certeorari* to quash the decision of the Minister but the application was refused. They appealed to the Federal Court.

Held, dismissing the appeal: (1) the Minister had a complete discretion as to the manner in which he was to act in settling a dispute as to recognition and in the circumstances of this case, there had been no breach of the rules of natural justice;

(2) as there was nothing on the facts or in the argument which could lead the court to the conclusion that the Minister's decision was a nullity, there were no grounds for interfering with the decision

Case referred to:-

(1) *Anisminic Ltd.* v. *Foreign Compensation Commission & Anor.* [1969] 1 All E.R. 208.

FEDERAL COURT.

S. Kulasegaran for the appellants.

Abdul Razak bin Datuk Abu Samah (Senior Federal Counsel) for the first respondent.

D. Puthucheary for second respondent.

Ali F.J.: This is an appeal against the dismissal of the appellants' motion for an order of *certiorari* to quash the decision of the Minister of Labour and Manpower. The decision is to the effect that the second respondent, Transport Workers' Union, Federation of Malaya, be accorded recognition by the appellant company.

On March 11, 1971 the union claiming recognition served a notice on the company under section 8(2)